No. 240

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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1933.

FEDERAL TRADE COMMISSION,
Petitioner,

vs.

ALGOMA LUMBER COMPANY, et al.,
Respondents.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Ninth Circuit.

RESPONDENTS' PETITION FOR REHEARING.

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Index

	Pages
FOREWORD	2
ARGUMENT IN SUPPORT OF PETITION	3
I. There has been no ruling by the Court upon the jurisdiction of the Federal Trade Commission over the subject matter of the complaints	3
II. The Court has mistakenly ascribed to respondents a contention that misleading trade nomenclature is excusable in consideration of forest conservation	4
III. The findings of the Commission are insufficient to establish a case of unfair competition against respondents, since neither fraudulent or deceptive motive nor fraud or deception in fact has been shown	6
CONCLUSION	9

Citations

CASES:

Federal Trade Commission v. Raladam Co., 283 U. S. 643, 51 S. Ct. Rep. 587, 75 L. Ed. 1324 ..... 3, 4

Federal Trade Commission v. Winsted Hosiery Co., 258 U. S. 483, 42 S. Ct. Rep. 384, 66 L. Ed. 729 8

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RESPONDENTS' PETITION FOR REHEARING.

Come now the respondents and respectfully petition for a rehearing herein and for grounds thereof show:

I.

That there has been no ruling by the Court upon the jurisdiction of the Federal Trade Commission over the subject matter of the complaints.

II.

That the Court has mistakenly ascribed to respondents a contention that misleading trade nomenclature is excusable in consideration of forest conservation.

III.

That the findings of the Commission are insufficient to establish a case of unfair competition against respondents, since neither fraudulent or deceptive motive nor fraud or deception in fact has been shown.

Foreword.

Respondents conceive it to be their duty to direct the Court's attention to the fact that the opinion rendered in this cause upon the 8th day of January, 1934, (1) omits to rule upon the point of jurisdiction, which was aptly raised and presented, and (2) ascribes to respondents a dubious contention which they have not in fact advanced. In addition we cannot but feel that (3) the Court's conclusions as to the facts go beyond anything that is fairly warranted either by the record or by the findings of the Commission. We shall seek brevity in urging these matters upon the consideration of the Court, but shall trust that such brevity of treatment may not be taken to evidence lack of confidence in the merit of this petition.

Argument in Support of Petition.

I.

THERE HAS BEEN NO RULING BY THE COURT UPON THE JURISDICTION OF THE FEDERAL TRADE COMMISSION OVER THE SUBJECT MATTER OF THE COMPLAINTS.

The third point presented by respondents upon brief (p. 56) was directed to the jurisdiction of the Commission and was phrased in the following terms:

> "'Unfair methods of competition' within the meaning and intendment of the Federal Trade Commission Act have not been established against the respondents upon the record or by the Commission's findings."

There followed three subsidiary propositions, phrased in the language of the Supreme Court in

> *Federal Trade Commission v. Raladam Co.*, 283 U. S. 643, 51 S. Ct. Rep. 587, 75 L. Ed. 1324.

It seemed to respondents, and it still appears to them, that they had aptly invoked the decision of this Court in the *Raladam* case in order to make clear the Commission's excess of jurisdiction. The opinion of the Court in that case affords a complete exposition of the genesis and purpose of the Federal Trade Commission Act, and it was specifically held therein that "unfair methods" are those resorted to for the purpose of destroying competition or of introducing a monopoly. It was there shown that the aim of the statute is to reach through administration the evils condemned generally by the Sherman Anti-Trust Act and the Clayton Act. Respondents relied with confidence upon this authoritative pronouncement. They undertook to demonstrate that the findings of the Commis-

sion could not serve to make out a case within the meaning or intendment of the statute. The discussion is found upon pages 56 to 60, inclusive, of respondents' brief. We need not again traverse the ground. The point was urged upon the Court in oral argument.

Respondents had faith in the validity of their contention that the Commission's orders proceeded from an excess of jurisdiction. True, the point attracted little notice on the part of the Commission, but it could not be thus lightly waved aside. The issue was necessarily in the case, and respondents anticipated that it would be the subject of a ruling by the Court.

There has been no such ruling. The point is not mentioned in the opinion. There is no reference to *Federal Trade Commission v. Raladam Co.*, the only case in which this Court has spoken specifically respecting the nature and objects of the statute, and defined the limits within which the jurisdiction of the Commission must be exercised.

Respondents seek a ruling upon the jurisdictional issue.

II.

THE COURT HAS MISTAKENLY ASCRIBED TO RESPONDENTS A CONTENTION THAT MISLEADING TRADE NOMENCLATURE IS EXCUSABLE IN CONSIDERATION OF FOREST CONSERVATION.

The fourth point noticed in the opinion of this Court is phrased and considered in the following terms:

> "*Fourth.* Finally, the argument is made that the restraining orders are not necessary to protect the public interest (see *Federal Trade Commission v. Royal Milling Co., supra*), but to the contrary that the public interest will be promoted by increasing the demand for *pinus ponderosa,* though it be sold with a misleading label, and thus abating the destruction of the pine forests of the east.
>
> "The conservation of our forests is a good of large importance, but the end will have to be attained by methods other than a license to do business unfairly."

The language employed by the Court seems clearly to imply that respondents have argued that "a misleading label" may be excused because thereby the sale of their lumber will be advanced and destruction of the eastern pine forests will be abated. Surely the reader would so understand. But the fact is that no such argument has been tendered on the part of respondents. We have not urged, nor intimated, that improper trade nomenclature is excusable, either in aid of forest conservation or otherwise. We have offered no argument whatever directed to forest conservation.

The Court apparently took note of the argument founded by our adversaries upon an observation of the lower court respecting the interest of the public in forest conservation. Apparently it has been assumed that this observation was responsive to a contention advanced by respondents. But respondents in fact advanced no such contention, as our adversaries will doubtless concede.

As it now stands, the opinion of the Court ascribes to respondents and to their counsel an argument which they have not advanced, and visits upon them a censure which is undeserved. Whatever may be the measure of the resulting obloquy, the respondents may justly petition for acquittance.

III.

THE FINDINGS OF THE COMMISSION ARE INSUFFICIENT TO ESTABLISH A CASE OF UNFAIR COMPETITION AGAINST RESPONDENTS, SINCE NEITHER FRAUDULENT OR DECEPTIVE MOTIVE NOR FRAUD OR DECEPTION IN FACT HAS BEEN SHOWN.

Respondents feel that in many important respects the Court's review of the facts goes beyond anything that is warranted by the Commission's findings. As a result respondents are in effect convicted of purposes and practices which the Commission itself, in view of the record, would hardly feel free to charge against them.

We cannot expect that the Court will now entertain a specification of the respects in which respondents feel that the terms of the decision transcend the Commission's findings, but at least we may point out that there cannot be discovered in the Commission's findings

(1) Fraudulent motive or purpose;

(2) Misrepresentation by respondents of their lumber, either as to identity, quality or utility;

(3) Substitution by respondents of their lumber upon orders for so-called "true white pine";

(4) The "passing off" by respondents of their lumber as and for a different product.

The opinion of the Court refers to "the woods that the respondents are selling as a substitute." (p. 7.) The Commission itself has not found that respondents are selling their lumber as a "substitute" for other lumber, at least in any culpable sense.

The opinion of the Court recites:

> "The consumer is prejudiced if upon giving an order for one thing, he is supplied with something else." (p. 8.)

It is further said:

> "Dealers and manufacturers are prejudiced when orders that would have come to them if the lumber had been rightly named, are diverted to others whose methods are less scrupulous." (pp. 8, 9.)

These and cognate statements found in the opinion of the Court are unexceptionable as declarations of principle, but we protest that they may not fairly be directed to any of the practices of respondents, either as recited in the Commission's findings or as shown of record. These respondents are not chargeable with "substitution", nor can they justly be placed in the category of "the careless and the unscrupulous".

In these respects, and in others, we think the statements found in the opinion of the Court go beyond the facts and that respondents are thereby subjected to unwarranted condemnation.

We think that the attention of the Court should again be directed to the fact that no witness in the proceedings before the Commission testified that he had been deceived or misled by this trade name into the purchase or use of

respondents' lumber. (Respondents' brief, p. 55.) It would seem that if deception or a substitution were as prevalent as the Commission's findings may superficially imply, some witness could have been obtained who would testify that he had been deceived.

It would not be appropriate here to seek either to renew or extend the argument, but we may summarize this feature of our protest in the confident declaration that there is neither evidence nor finding that respondents have employed their trade name as an instrument of fraud or deception. In this respect the case is wholly dissimilar to *Federal Trade Commission v. Winsted Hosiery Co.*, 258 U. S. 483, 42 S. Ct. Rep. 384, 66 L. Ed. 729, in which the falsity of labels was palpable, and fraud and deception were intended and achieved.

Throughout the opinion of the Court there is evident a misapprehension as to the nature of respondents' defense. It is not that respondents seek to retain a name which is false, misleading or deceptive or which will permit their lumber to pass into trade or industry as something which it is not. It is not that they seek to take trade unjustly from a competitor or to supply to a consumer a product which, except for the particular trade name, would not be accepted. It is rather the position of respondents that this lumber, in essential mechanical properties and commercial qualities, belongs in the white pine group of pine lumbers, where it has always been placed by the consensus of the trade; that this trade name has no botanical connotation—in other words, that it does not represent or imply that the lumber is yielded by a tree which botanists have assigned to their "white pine

group''; and that it has not been used in contravention of the terms or purpose of the statute. Whether or not this defense be sufficient, it has at least been honorably advanced.

Conclusion.

Respondents seek a rehearing to the following ends:

1. That the issue as to the Commission's jurisdiction over the subject matter of the complaints may be determined;

2. That respondents may be acquitted of a contention, not advanced on their part, which the Court has mistakenly ascribed to respondents and thereupon visited upon them an undeserved rebuke;

3. That respondents may be relieved of all charges or implications of fraudulent or unscrupulous dealing.

Respectfully submitted,

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Attorneys for Respondents.

Dated: San Francisco, California,
January 27, 1934.

CERTIFICATE OF COUNSEL.

The undersigned hereby certifies that he is one of the counsel for the respondents herein, and that the foregoing Petition for Rehearing is presented in good faith and not for delay.

ALLAN P. MATTHEW.

Dated: San Francisco, California,
January 27, 1934.